Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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No. 89-1723

In the Supreme Court of the United States

October Term, 1989

JOHN J. B. JONES,
an Individual,
Petitioner,

vs.

BASKIN FLAHERTY ELLIOTT & MANNINO, P.C.,
a Professional Corporation,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Orders of the courts below and the jurisdictional statement are set forth respectively in the Petitioner's Appendix ("App.") at 1a-18a and the Petition ("Pet.") at 2, and are not repeated here. There are no parent or subsidiary corporations of Respondent.

COUNTERSTATEMENT OF THE CASE

Petitioner John J. B. Jones ("Jones") was a partner/shareholder in the law firm of Baskin Flaherty Elliott & Mannino, P.C. or predecessor firms ("BFEM"), from September 1975 to March 31, 1985. On December 4, 1984 Jones was informed that he would be terminated effective March 31, 1985. At the time of this notice he was 60 years old.

On September 10, 1985, 280 days later, Jones submitted a charge alleging a violation of the Age Discrimination in Employment Act ("ADEA") to the Equal Employment Opportunity Commission ("EEOC"), and specifically requested that EEOC *not* refer the charge to the Pennsylvania Human Relations Commission ("PHRC") for investigation. Jones made no separate filing with the PHRC at this time, and there is no record that EEOC ever referred the charge or that PHRC ever received notice that it had been filed with the EEOC. App. at 8a. Subsequently, on June 16, 1986, some eighteen months after receiving notice of his termination, Jones submitted a copy of his EEOC charge to the PHRC. The PHRC docketed this charge, and by letter dated August 22, 1986 dismissed it because it was untimely under state law. Record at 254a (references to "Record" are to the Joint Appendix filed with the United States Court of Appeals for the Third Circuit). Jones stated

that his only purpose for filing this PHRC charge was to get a letter from that agency confirming that state proceedings had been terminated so that he could commence his federal lawsuit. Record at 253a. Jones commenced a civil action on, *inter alia*, his ADEA claim on December 1, 1986.

BFEM moved for summary judgment on Jones' ADEA charge on the basis that it was not timely filed. BFEM argued that because Jones resides in "a State which has a law prohibiting discrimination in employment because of age," 29 U.S.C. Sec. 633(b), he was obligated to commence State remedial proceedings within 300 days of the discriminatory event in order to benefit from the 300-day federal charge filing period set forth in 29 U.S.C. Sec. 626(d)(2). Because Jones produced no evidence that he had commenced state proceedings within 300 days, the alternative 180-day limitations period was applicable, 29 U.S.C. Sec. 626(d)(1), Jones' EEOC charge was untimely and his action was thus barred.

The district court accepted this argument and granted BFEM's motion. The court rejected Jones' argument that he was entitled to rely on the provisions of the work-sharing agreement between PHRC and EEOC to perfect his state filing. After weighing the equities of Jones' peculiar factual circumstances, the court concluded that his status as an attorney, his evident familiarity with the procedures of both state and federal remedial agencies, and his explicit instructions to the EEOC not to refer the charge to PHRC for investigation, all militated against any equitable tolling of the charge filing period. App. 8a. In so ruling, the court was careful to limit its decision to the unique facts before it: "Were Jones not an attorney who explicitly told the EEOC not to refer his charge to the PHRC, we would

probably presume that EEOC had followed its agreement with PHRC and referred the charge, and we would not penalize him if the EEOC failed to do so." *Id.*

The Third Circuit Court of Appeals affirmed this disposition of Jones' ADEA claim, and denied Jones' Petition for Rehearing. App. at 16a, 18a.

REASONS FOR DENIAL OF THE WRIT

Despite Jones' arguments that his case presents issues of overriding public importance, the decisions below are no more than appropriate applications of settled legal principles. There is no reason for this Court to exercise its discretionary power of review.

This Court has long held that timely filing of a charge of discrimination "is not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling." *Zipes v. Trans World Airlines*, 455 U.S. 365, 393 (1982). A prerequisite to such tolling, however, is the existence of factors justifying invocation of the court's equitable discretion. *See, Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 152 (1984) ("Procedural requirments established by Congress for gaining access to the federal courts are not to be disregarded by courts out of vague sympathy for particular litigants"). In the present case, the district court carefully considered and rejected the equitable factors presented by Jones in support of his tolling argument, noting that Jones' "status as an attorney places him on a par with plaintiffs who are represented by counsel, and the case law clearly places a high duty of vigilance on such plaintiffs." App. at 8a. This conclusion is fully supported by this Court's recent decision in *Hallstrom v. Tillamook County*, ___ U.S. ___, 110 S.Ct. 304,

310 (1989) (where attorney acknowledges awareness of time limits "it is not unfair to require strict compliance with statutory conditions precedent to suit"), and by the decisions of the Circuit Courts applying the doctrine of equitable tolling. *See, e.g., Hill v. John Chezik Imports*, 869 F.2d 1122, 1124 (8th Cir. 1989); *Dougherty v. Barry*, 869 F.2d 419, 420-421 (6th Cir. 1988); *Harvey v. City of New Bern Police Department*, 813 F.2d 652, 654 (4th Cir. 1987); *Bolling v. City & County of Denver*, 790 F.2d 67, 69 (10th Cir. 1986); *Kocian v. Getty Refining & Marketing Co.*, 707 F.2d 748, 755 (3d Cir. 1983), *cert. denied*, 464 U.S. 852 (1983). The writ should be denied.

I. The case does not involve interpretation of EEOC work-sharing agreements

Jones' first argument in support of review is premised on what he characterizes as the district court's disregard for the provisions of the work-sharing agreement and the EEOC's interpretation of it. Pet. at 9. The argument overlooks the fact that the courts below did not pass on the EEOC's interpretation of its work-sharing agreement.

In response to BFEM's motion for summary judgment, Jones submitted a copy of an unauthenticated document he represented to be the applicable work-sharing agreement, which he extracted from a 1988 volume of the Duquesne Law Review. Record at 169a-177a. *See* 26 Duq.L.Rev. 410 (1988). He also submitted an affidavit from the Director of the EEOC's Pittsburgh Area Office. That affidavit states only that in September, 1985, it was the "routine practice" of the Pittsburgh Area Office to refer all age discrimination charges to the PHRC by mailing them at the end of the week. It states further that no records were maintained of these mailings, nor does the

Pittsburgh office have any record of its disposition of Jones' charge. The affidavit makes no mention of any work-sharing agreement. Record at 167a. A copy of the affidavit is contained in Respondent's Appendix at R.A.1.

The district court did consider Jones' evidentiary proffer despite its deficiencies. The court referred to the affidavit and the proffered document in its opinion, and specifically considered Jones' argument that he was entitled to rely on the EEOC to complete the procedural prerequisites to bringing suit. App. at 5a. By rejecting Jones' contention that his filing with EEOC should satisfy his state filing requirement, however, the court merely rejected an argument for equitable tolling based on EEOC's apparent inaction. App. at 5a-6a. Reduced to its essential premise, the district court's conclusion is that the normally prevailing presumption that EEOC follows its own procedures is not irrebuttable, and that in the absence of equitable factors, knowledgeable claimants may not rely on the agency's inaction to forgive their own lack of diligence. As noted above, this premise is amply supported by this Court's jurisprudence. *E.g., Hallstrom v. Tillamook County*, 110 S.Ct. at 310; *Baldwin County Welcome Center v. Brown*, 466 U.S. at 152. The court did not reject the EEOC's interpretation of its work-sharing agreement because neither Jones nor EEOC presented the agency's interpretation to the court.

On appeal, Jones' sought and was granted leave to supplement the record on appeal to include a second affidavit from the Director of the EEOC's Pittsburgh Area Office and an authenticated copy of the applicable work-sharing agreement. This affidavit presents for the first time in the litigation the EEOC's "interpretation" that the filing of a charge with EEOC automatically constituted filing

with the PHRC. The Third Circuit nevertheless affirmed the district court's disposition of the action in an unpublished *per curiam* order. It cannot be said that by this disposition the Third Circuit placed any construction on the work-sharing agreement, and even less can it be concluded that the court rejected the EEOC's own construction. Rather, the circuit court's dispostion of the case simply affirms the district court's treatment of the facts presented to it, without considering those issues belatedly raised by Jones to impeach the district court's decision. This was a proper application by the Third Circuit of its appellate authority that in no way results in the draconian consequences set forth in the Petition. *See, e.g., Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 29 (1983) ("Ordinarily, we would not expect the Court of Appeals to pass on issues not decided in the District Court"); *Americans Disabled for Accessible Public Transportation v. Skinner*, 881 F.2d 1184, 1197 (3d Cir. 1989) ("It is the general rule that a federal appellate court does not consider an issue not passed on below.")

Even more fundamentally, however, the interpretation of the work-sharing agreement relied on by the Petitioner cannot be labelled as an official agency interpretation entitled to any deference. As noted, the second affidavit proffering the interpretation urged by Petitioner is that of the Director of the EEOC's Pittsburgh Area Office, not that of an EEOC Commissioner or some other representative of the Commission authorized to speak on matters of policy. The basis for the Area Director's authority is not set forth in the affidavit, nor is the basis of his knowledge of PHRC practice. The procedural regulations in effect at the time did not require EEOC to refer ADEA charges to state agencies. See 29 C.F.R. Sec. 1626.9(a)

(1985) ("The Commission *may* refer all charges to any appropriate state agency...") (emphasis supplied). The regulations do not state that a charge received by EEOC will be considered filed with a state agency, but only that ADEA charges received by EEOC and forwarded to state agencies will be considered filed with EEOC on receipt. *Id.* at Section 1626.9(c). Moreover, the work-sharing agreement itself states only that each party is an agent of the other for purposes of "receiving" charges, not for "filing" them. The interpretation urged by the Petition is further undermined by the specific and detailed procedures which are outlined in the agreement for informing and physically submitting charges to the other agency. R.A. 6 (excerpts from work-sharing agreement). Thus, the interpretation proffered by Jones carries no official imprimatur, is not supported by the EEOC's own duly promulgated procedural regulations and is not supported by the language of the work-sharing agreement itself. There was thus no deference due it initially, and no need for this court to examine the issue. See *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 109 S.Ct. 468, 473 (1988) (no deference due "an agency counsel's interpretation of the statute where the agency itself has articulated no position on the question").

II. The decision below is in accord with principles of *EEOC v. Commercial Office Products*

Petitioner's second argument in support of review raises the specter of the lower courts' infidelity to the principles established in *EEOC v. Commercial Office Products*, 486 U.S. 107 (1988). That case simply did not address the issues presented here, and in any event, there is no conflict with that decision discernible from the text of the district court's opinion.

In *Commercial Office Products* this Court held that a state agency's waiver, pursuant to the terms of a work-sharing agreement with EEOC, of its exclusive right to process a discrimination charge cognizable under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(c), terminated state proceedings so that a charge received within 300 days of the discriminatory event could be filed with EEOC upon receipt. It is noteworthy that the record in *Commercial Office Products* demonstrated that the charge received by EEOC was physically presented to the state agency there concerned, which then physically returned the charge to EEOC with its waiver and also informed the charging party of the waiver, all within 300 days of the event. The Court also held that a charge is timely filed with the EEOC where it is filed with *both* the state agency and the EEOC within 300 days. *Commercial Office Products,* 486 U.S. at 120-125.

The decisions of the courts below do no violence to these principles. The district court first held that in order to take advantage of the 300 day federal filing period, the claimant must submit charges to both the state agency and the EEOC within 300 days. App. at 4a. If state proceedings are not commenced within 300 days, then the 180-day period applies to the claimant's EEOC charge. 29 U.S.C. Sections 626(d), 633(b). The court *did not require,* as is alleged in the Petition, at 13, that the claimant file a timely charge under state law in order to avail himself of the extended federal filing period. The court's holding is no radical departure from established principles, and in fact gives meaning to the two-tiered limitation scheme enacted by Congress in the ADEA. See *Oscar Mayer & Co. v. Evans,* 441 U.S. 750, 753 (1979); *Kocian v. Getty Refining*

& Marketing Co., 707 F.2d 748, 751 (3d Cir.), *cert. denied*, 464 U.S. 852 (1983).

Second, the district court did not hold, as is intimated by the Petition, that the EEOC can not initiate state proceedings on behalf of a claimant. Rather, the court determined based on the facts presented to it only that EEOC had failed to do so in this case, and that there were no equitable considerations present to excuse this failure. App. at 6a-8a.

The Petitioner's reliance on the Court's discussion of work-sharing agreements in *Commercial Office Products* is misplaced. The issue presented by BFEM's motion for summary judgment was not whether state proceedings had been "terminated", but rather whether they had been commenced. *Commercial Office Products* does not address this issue because it was clear under the facts of that case that the charge filed with the EEOC had in fact been referred to the state agency within 300 days, evidence wholly lacking in the present case. Neither this Court nor any other of which Respondent is aware has sanctioned the conclusion that state proceedings are commenced upon receipt of charges by EEOC, without subsequent notification to the state agency that the charges have been received. *See Oscar Mayer*, 441 U.S. at 756 ("state agencies cannot even attempt to resolve discrimination complaints not brought to their attention . . ."). *Cf. Love v. Pullman Co.*, 404 U.S. 522, 525 (1972) (oral *notice* to state agency sufficient to initiate state proceedings). Such a conclusion would effectively permit EEOC and the states to eliminate by contractual agreement the statutory requirement that proceedings under state law be "commenced" before a court action may be maintained. 29 U.S.C. Sec. 633(b).

It would certainly be a novel result if a state proceeding could be "commenced" without notice to the state agency that the proceeding had even been filed. Moreover, the ADEA itself provides that where a state agency requires more than the filing of a written and signed statement of the facts on which the proceeding is based, the state proceeding "shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate state authority." 29 U.S.C. Sec.633(b). Thus the statute precludes the Petitioner's interpretation; it is not receipt by EEOC which commences state proceedings, but sending the charge to the State agency which does so. Here, there is no evidence that EEOC did in fact send Jones' charge to the PHRC, and thus it cannot be concluded that state proceedings were ever commenced. *Blumberg v. HCA Management Corp.*, 848 F.2d 642, 646 (5th Cir. 1988). And as discussed above, there are no equitable factors favoring forgiveness of this lapse.

There is no conflict with this Court's decision in *EEOC v. Commercial Office Products.* The writ should be denied.

III. There is no conflict among the Circuit Courts of Appeals

As indicated above and contrary to the Petitioner's assertion at p. 16, the district court did not rule that Jones' claim was time barred because he had failed to initiate state proceedings within the state's own time limits. Rather, the court held that "Jones must have filed an action before both the PHRC and the EEOC within 300 days of the alleged discriminatory acts in order to bring this action in federal court." App. at 4a.

The decisions cited by Petitioner do not address the subsidiary question of when, if not within state limitations periods, state proceedings must be commenced to enable a claimant to utilize the extended 300-day federal filing period. Those few cases which have considered the issue have held, as did the district court, that both state and federal proceedings must be initiated within 300 days. *See, e.g., Kocian v. Getty Refining & Marketing Co.,* 707 F.2d at 751 ("a litigant who does not 'initially institute' state proceedings in the state agency is not entitled to the 300-day limitations period"). *Jackson v. Savin Corp.,* No. 86-2126, 43 F.E.P. Cases 1575, 1577 (D.N.I. 1987) ("This court finds that the state filing must occur within the 300-day limit for that exception to apply.") *Cf. Mohasco Corp. v. Silver,* 447 U.S. 807, 821 (1980) (dual limitations period not designed to permit claimants in some states to proceed with less diligence than those in others).

IV. There is no basis for application of the Doctrine of Equitable Tolling

Both courts below have rejected Petitioner's claim that his failure to initiate state proceedings within the applicable period should be forgiven. Jones has presented no "special or important reasons", Supreme Court Rule 10.1, justifying this Court's review of these dispositions. His belated claim of reliance on the EEOC is belied by his own deposition testimony, which is set forth at length below:

> Q: Did you ever receive from the EEOC any document that indicated that there was a deferral or referral of the charge you filed with that agency to the Pennsylvania Human Relations Commission?

A: I specifically asked them not to refer it for investigation by the Pennsylvania Human Relations Commission.

Q: Then you made this request at the time you filed the charge?

A: Absolutely. At the time the charge was filed, we were advised that we had the option of having the investigation conducted by the EEOC or by the PHRC. Specter was with me at that time, and we both immediately elected to have it handled by the EEOC.

Q: So, again, for completeness, you individually requested that any investigation that be conducted be done by the EEOC?

A: Absolutely.

Q: Again, with regard to your knowledge, no document exists in the EEOC file that indicates that the EEOC transferred or deferred the charge that you had filed, then, to the Pennsylvania Human Relations Commission, except the work-sharing agreement itself?

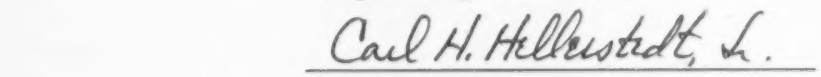
A: Well, I have no knowledge, period. I can't answer the question. I don't know whether they did or whether they didn't. It's my understanding that typically the EEOC notifies the PHRC, but *I don't know whether they did, in fact, and I don't really care.*

Record at 251a-252a. The lower courts' refusal to excuse Jones' lack of diligence is fully supported by the record and by authority of this Court. *Hallstrom v. Tillamook County,* 110 S.Ct. at 310.

CONCLUSION

The disposition of Jones' claim does not involve any matters of great public import, does not conflict with any decision of this Court, and does not conflict with any decision of the circuit courts of appeal. The questions presented are of personal, not public interest. The district court was careful to mold its decision to the peculiar facts presented to it. The Third Circuit's affirmance signifies only that the appropriate legal principles were applied to these unique facts. The writ should be denied.

Respectfully submitted,



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County of Allegheny

AFFIDAVIT

I, EUGENE V. NELSON, being first duly sworn, depose and say that the following is true to the best of my knowledge, information and belief:

1. I am currently the Director of the Pittsburgh Area of the Equal Employment Opportunity Commission ("EEOC") and was the Director in September, 1985.

2. In September, 1985, it was routine practice for the Pittsburgh Area Office of the EEOC to refer all Age Discrimination in Employment Act ("ADEA") charges to the Pennsylvania Human Resources Commission ("PHRC") in order to comply with §14(b) of the Act and to preserve the individuals' rights.

3. In September, 1985, at the end of every week, all ADEA charges received during that week were mailed to PHRC.

4. This was a routine practice, regularly followed, for which no records were maintained.

5. Even if records were maintained, under the record retention program followed by the Pittsburgh Area Office of the EEOC, many of the records and individual files from September, 1985 have already been destroyed.

6. I am certain that this practice of referral was followed in September, 1985 and that all ADEA charges received in this office during that month were referred to the PHRC in accordance with this practice.

FURTHER THE AFFIANT SAYETH NOT.

/s/ EUGENE V. NELSON

Eugene V. Nelson

SWORN TO and subscribed
before me this 7th day of
March, 1989.

/s/ BRUCE BAGIN

Notary Public

My Commission expires: May 5, 1990

Commonwealth of Pennsylvania
County of Allegheny

AFFIDAVIT

I, EUGENE V. NELSON, being first duly sworn, depose and say that the following is true to the best of my knowledge, information and belief:

1. I am currently the Director of the Pittsburgh Area Office of the Equal Employment Opportunity Commission ("EEOC") and was the Director in September of 1985.

2. Attached hereto as Exhibit "A" and made a part hereof, is a true and correct copy of the Worksharing Agreement Betwen The Pennsylvania Human Relations Commission and the Equal Employment Opportunity Commission, dated October 1, 1982; plus an Amendment to said Worksharing Agreement, effective November 1, 1982; plus two (2) Extensions extending said Worksharing Agreement until September 30, 1985; (all hereinafter collectively referred to as the "Worksharing Agreement").

3. Under the Worksharing Agreement which was in effect and followed by this Ofice in September of 1985, the filing of an Age Discrimination in Employment Act ("ADEA") charge with the EEOC was considered received by the Pennsylvania Human Relations Commission ("PHRC") on the same date and the proceedings were thereby initiated with the PHRC on that same date.

4. In September of 1985, even if a claimant specifically instructed the EEOC not to refer an ADEA charge to the PHRC, whether for investigation or otherwise, the charge was still considered to be automatically received by the PHRC and a written referral was made by the EEOC to the

PHRC in accordance with the federal regulations governing the EEOC found at 29 C.F.R. 1626.9 and the EEOC Compliance Manual.

5. It is the duty of the EEOC to protect the federal rights of all ADEA claimants. Therefore, when an ADEA charge is filed with the EEOC, then the EEOC, under the federal statute, regulations and Worksharing Agreement, must refer the case to the PHRC at the same time even if the claimant requests otherwise.

6. In accordance with the federal regulations and the Worksharing Agreement which were both in effect in September of 1985, the ADEA charge filed by John J. B. Jones with the EEOC on September 10, 1985, would have been automatically received by the PHRC on the same date because the EEOC was an authorized agent of the PHRC by operation of the agency provision in said Worksharing Agreement.

7. In accordance with the federal regulations and the Worksharing Agreement which were both in effect in September of 1985, the ADEA charge filed by John J. B. Jones with the EEOC on September 10, 1985, would have automatically been referred by mail to the PHRC within the week.

R.A.5

FURTHER THE AFFIANT SAYETH NAUGHT.

/s/ EUGENE V. NELSON

Eugene v. Nelson

SWORN TO and subscribed before me
this 22 day of November, 1989.

/s/ BRUCE BAGIN

Notary Public

My Commission expires: May 5, 1990

II. Filing Allegations of Discrimination (Charges)

a) In order to facilitate the assertion of employment rights, the EEOC and the PHRC each designate the other as its agent for the purpose of receiving charges.

b) Each agency will inform individuals of their right to file with the other agency and will endeavor to aid any person who is alleging employment discrimination to draft a charge in a manner that will satisfy the requirements of the other agency or to otherwise assist that person in the filing of the charge with the other agency.

*****

e) Each agency will endeavor to forward all appropriate charges to the other agency on a daily basis or as soon as practicable.

f) Within one week of EEOC's receipt of a dual-filed charge, or as soon as otherwise is practicable, EEOC will provide PHRC with either EEOC's charge number or the reason the referred charge was unacceptable for docketing by EEOC.

*****

j) Age charges initially received by EEOC will be "referred" to PHRC preserve the charging party's federal court rights. Where necessary to meet provisions of age contracts with PHRC, EEOC will designate certain co-jurisdictional charges as "transmittals" to be initially processed by PHRC. For "walk-in" age charges initially received by EEOC which appear suitable to be transmittals, EEOC will endeavor to take the charge on a PHRC Complaint Form as well as on an EEOC

Charge Form. This PHRC Complaint Form will be completed in a manner so as to facilitate the docketing of the complaint by PHRC to include the following: charging party and respondent name; to indicate that the charge has also been filed with EEOC; the form will be signed by the charging party and will, whenever possible, be notarized. For the addresses of the charging party and the respondent and also for the details of the allegation it will be sufficient to refer to the attached EEOC Charge Form. Both the PHRC and EEOC Charge Forms will be sent to PHRC.

k) Age referrals/transmittals will be sent to PHRC on a weekly basis.

CERTIFICATE OF SERVICE

I, Carl H. Hellerstedt, Jr., counsel for Respondent, do hereby state that I served a copy of a BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI by regular U.S. Mail, postage prepaid, this 15th day of June, 1990, upon the following:

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